No. 74-834

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1974

JAMES G. DEMOPOULOS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1974

NO.

JAMES G. DEMOPOULOS,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, James G. Demopoulos, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on November 5, 1974. A divided panel (Pell, Cir. J., dissenting) affirming the judgment of conviction on a criminal perjury charge. Petition for rehearing was denied on December 12, 1974.

OPINION BELOW

The judgment of the District Court is not reported. The opinion of the Court of Appeals for the Seventh Circuit is not, as yet, officially reported. It is reproduced as Appendix A to this Petition. The order denying rehearing is reproduced as Appendix B (Pell, Cir. J., voted to grant rehearing).

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of conviction and sentence of the District Court was entered on November 5, 1974 (App. A). The Petition for rehearing was denied on December 12, 1974, (App. B). The jurisdiction of this Court is invoked, pursuant to the provisions of Title 28, United States Code, 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1.

Whether this Court will review as "plain error" directed verdict of guilty instructions in a Federal Criminal case where the instructions have been found to be impermissible by this Court in *United Brotherhood, et seq.* v. *United States*, 330 U.S. 395, 408, 67 S.Ct. 775, 782 (1947)?

A. Whether this Court may review as "plain error" directed verdict of guilty instructions which were not raised on appeal until a timely petition for rehearing was filed?

II.

Whether Demopoulos was denied both 5th and 6th Amendment rights where the District Court totally failed to hold any Rule 30[1] conference and thereafter charge the jury in two (2) separate instructions that they "must" and "should" find Demopoulos guilty?

A. Whether the Trial Court committed reversible error in refusing to hold any instruction conference either before or after charging the jury, albeit timely request, in violation of Rule 30, Federal Rules of Criminal Procedure?

B. Whether the District Court made a "mockery" of "due process" by giving defense counsel an empty courtroom and a court reporter (absent the trial judge) to allow post-charge objections to instructions, especially where the Court disallowed any pre-charge objections to the jury charge?

---

[1] At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.
As amended Feb. 28, 1966, eff. July 1, 1966.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution of the United States provides:

> "... No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law."

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

Demopoulos, an attorney, was indicted by a Federal Grand Jury in Chicago, Illinois, in August, 1973 (R. 1).[2] The indictment charged two (2) counts, to-wit: Count 1, conspiracy to violate the "Hobbs Act" (18 U.S.C. 1951) in that he and a Chicago Police Captain, Mark Thanasouras acted in violation of Federal law regarding their activities in the securing of a Chicago retail liquor license for a restaurant and lounge in February, 1969; Count 2, charged that Demopoulos committed perjury before the same Grand Jury in that he lied when he testified before that Grand

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[2] In this Petition: (1) Petitioner, James Demopoulos, will be called "Demopoulos"; (2) R. will be the record transmitted from the Court of Appeals for the Seventh Circuit to this Court; (3) Tr. will refer to the Transcript of Proceedings in the District Court. The Record and trial transcripts are lodged with the Clerk of this Court.

Jury on August 21, 1973. The perjury count charged a violation of 18 U.S.C. 1623.[3]

---

[3] § 1623. False declarations before grand jury or court

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

Added Pub.L. 91—452, Title IV, § 401(a), Oct. 15, 1970, 84 Stat. 932.

The charges were severed for trial and Demopoulos was tried only on the perjury count, the conspiracy count is yet pending and unresolved in the District Court.

In substance, the perjury count charged that Demopoulos lied when he testified before the Federal Grand Jury on August 21, 1973. The allegations of perjury assert Demopoulos' declarations that he denied meeting in the Rex Restaurant in Chicago, Illinois, "in or about, February, 1969", and that he further denied receiving any monies from either Sam Crispino or Peter Boznos in the Rex Restaurant in Chicago, in or about February, 1969 (R. 1, Pages 5, 6), were false.

The Government proffered the testimony of two (2) immunized witnesses regarding the payment of the bribe. The first and primary Government witness was Peter Boznos, a lawyer, who had testified on prior occasions before a Federal Grand Jury in Chicago, Illinois; Boznos had been granted immunity by the Government in order to secure his testimony. In substance, Boznos testified that in late February of 1969, he met Demopoulos in the Rex Restaurant in Chicago, Illinois. Boznos testified that at this meeting he introduced his client, Sam Crispino, to Demopoulos, and that in the course of a few minutes, Crispino handed Demopoulos a package (Tr. 142); although Boznos claimed he never saw the package change hands (Tr. 142). Boznos had earlier informed the F.B.I. that there had been no bribe involved in the issuance of the liquor license for the Cafe Chablis. Crispino, also immunized, testified that in late February, 1969, at the Rex Restaurant in Chicago, Illinois, he and Boznos had a meeting with an unidentified man (Tr. 270, 271). It is interesting to note that Crispino identified a courtroom spectator, rather than Demopoulos, as the "bagman" (Tr. 272). Of more interest is that the affirming Court asserts that the spectator, one Gregory Vlamis, is a relative of

Demopoulos. Such an assertion is astonishing insofar as no proof nor assertion nor intimation of such exists in any record—let alone the court record. Thus, the only trial witness identifying Demopoulos as being the "bagman" was Boznos, the immunized witness.

The factual framework becomes important because the Government's evidentiary theory at trial was that the Cafe Chablis could not operate without a Chicago liquor license and that this particular liquor license, before its issuance, had to be approved by Captain Thanasouras. The Government theory at trial was that Demopoulos acted as the "bagman" for Thanasouras who picked up the bribe money, so that the liquor license could or would be approved by him. In actuality, the liquor license was approved by Thanasouras on February 5, 1969, and the Government trial testimony revealed the bribe took place in late February, 1969, (Tr. 185). Boznos testified that the "bribe meeting" occurred as a result of an anonymous phone call from an unknown individual who claimed to be from the Austin Police District, which at that time was commanded by Thanasouras (Tr. 137-139). Boznos further stated that the mysterious phone caller said that the money was needed to have the license approved (Tr. 137). Boznos and Crispino each testified they were in the Rex Restaurant in late February, 1969, and Boznos testified that Demopoulos arrived and picked up the money from Crispino (Crispino could not identify Demopoulos).

The last witness for the Government was Special Agent Harold K. Johnson of the F.B.I., who testified that in an interview with Demopoulos prior to his Grand Jury testimony, that he denied knowledge of Crispino or of any money being paid in connection with the liquor license for the Cafe Chablis (Tr. 308, 309, 310). A timely motion for judgment of acquittal was denied (Tr. 315-321).

Demopoulos testified that he was in Greece when the payoff or bribe was to have taken place (Tr. 369, 370), and Demopoulos' passport was introduced to the trial jury (Tr. 370). Special Agent Dallman, of the F.B.I., in Chicago, Illinois, testified as a defense witness (Dallman sat at Government counsel table throughout the trial and was introduced to the jury during the Government's opening statement as the case agent). In substance, Dallman testified that his earlier interviews with Boznos were totally inconsistent with the trial testimony of Boznos. In essence, the trial jury was presented with a fact situation where the immunized Government witness called the F.B.I. case agent a liar (Tr. 169-171), and vice versa, the F.B.I. agent called the Government witness a liar (Tr. 365).

After the close of all the evidence, a renewed motion for judgment of acquittal was denied and a short recess was taken. The divided opinion affirming the conviction, allows that the ten (10) minute recess was so that trial counsel could examine the instructions about to be given to the jury (Sl. Op. Page 9). SUCH IS HARDLY THE CASE (our emphasis). In the sequence of events, "due process-mockery" becomes apparent. Prior to the cause being submitted to the jury, defense counsel (Mr. Callaghan) asked as follows:

> "Mr. Callaghan: Maybe we could spend an hour or so this afternoon, if you want us to, on the instructions.
>
> Do you want to do that?
>
> The Court: No, no.
>
> Mr. Callaghan: You will just give them—either give them or refuse them?
>
> The Court: That's right.
>
> Mr. Callaghan: You don't have conferences?
>
> The Court: No. But to this extent, if you have any—and I think there is one that I may want sug-

gestions and comments on, but that will be by my invitation." (Tr. 416).

* * *

The Court: But I don't have conferences on instructions, *especially where you quote the statute and* so forth, or the law, upon which you are relying. Most of them are stock anyhow. There may be one or two where I will want to hear from you.

Mr. Callaghan: Do you adhere to Rule 30, that we have to make our objections after you've given them? Sometimes we go and make our record in chambers ahead of them.

The Court: No, I don't go in chambers. You can make your objections after you make your final arguments.

Mr. Callaghan: After you've charged the jury?

The Court: After I've charged the jury, yes.

We will make the court reporter available to you, and you can make your record." (Tr. 417)

After the District Court told defense counsel there would be no conferences the following occurred:

"The Court: The motion for acquital is denied. Now, you want a ten-minute recess in order to prepare yourselves?

Mr. Callaghan: I would just like to assemble a few notes, and I know he would too, because I have put in some proof since I did prepare a sort of sketch of my argument.

The Court: All right, we will recess for ten minutes. Is there any objection by counsel to having me take the court reporter, so that I can explain to the jury the administrative end—that we are going to try to finish today, and that it will get to them this afternoon, and we will make arrangements for their dinner and so forth?

Mr. Mullen: None, your Honor.

Mr. Callaghan: No objection.

Mr. Mullen: Could I just bring up one point, your Honor, while we are outside the presence of the jury?

The Court: Yes.

Mr. Mullen: Your Honor, I had two instructions, one on identification and one on the telephone conversations that I was going to submit. They are not done yet.

The Court: When you get them, give them to me.

Mr. Mullen: O.K., fine.

The Court: Very well. (Tr. 420, 421)

Absent trial counsel, the court advised the jury in the jury room that both sides had rested and there was going to be a ten minute recess because:

"... They are now looking at some instructions, which is going to take about 10 minutes, and they will start their final arguments to you, the jury, at about 10 minutes to 3. . ." (Tr. 421)

Thus, the trial transcripts demonstrate that the short hiatus between the motion for judgment of acquittal and the closing arguments was TO PREPARE THE CLOSING ARGUMENT AND NOT TO REVIEW THE INSTRUCTIONS. IN FACT, THE UNITED STATES ATTORNEY REQUESTED THE RECESS BEFORE THE ARGUMENT FOR JUDGMENT OF ACQUITTAL. (our emphasis) (Tr. 419)

Thus, the majority opinion read into the trial record an important fact, i.e., a ten (10) minute recess to review instructions, where such was clearly false. Nowhere within this short trial record is there any statement about the review of instructions prior to the submission of the case to the jury.

The Court, *inter alia*, charged the jury as follows:

"The accuracy of an identification of a particular defendant by a witness in this case must be determined from all the circumstances relating to that identifica-

tion. In this connection, if you believe from all the evidence and circumstances pertaining to a particular defendant that there is reasonable doubt as to the accuracy of the identification and that defendant as a participant in the acts charged in the indictment, then you must find him not guilty. *On the other hand*, if you find beyond a reasonable doubt from all the evidence and circumstances the identification of that particular defendant as a participant in the acts charged in the indictment is accurate, *then you must find him guilty*. (our emphasis)

The defendant in this case states that he was not at the Rex Restaurant with the witnesses, Boznos and Crispino. The burden of proof is on the prosecution with reference to each element of the crime charged and this burden includes the burden to prove beyond a reasonable doubt that the defendant was the person at the Rex Restaurant on the date in question. In considering the testimony concerning the identification of the defendant, you will determine the credibility and weight of this evidence in the same way you do other evidence, and if you do not believe beyond a reasonable doubt that the defendant, James Demopoulos, was at the Rex Restaurant on the date in question, then you should find him not guilty. *On the other hand*, if you find beyond a reasonable doubt from all the evidence and circumstances that James Demopoulos was at the Rex Restaurant on the date in question, *then you should find him guilty*. (Tr. 473, 474) (our emphasis)

The lack of ANY RULE 30 PROCEDURE (our emphasis) in the District Court gave rise to the directed verdict of guilty instructions. The Government put the Court on notice of their intention to proffer these alarming instructions just prior to the closing arguments:

> "Mr. Mullen: Could I just bring up one point, your Honor, while we are outside the presence of the jury?

The Court: Yes.

Mr. Mullen: Your Honor, I had two instructions, one on identification and one on the telephone conversations that I was going to submit. They are not done yet.

The Court: When you get them, give them to me.

Mr. Mullen: O.K., fine.

The Court: "Very well." (Tr. 420, 421)

After the jury retired to deliberate, Defense Counsel sought the indulgence of the Court to voice objections to the instructions already given to the jury, ABSENT ANY CHARGE CONFERENCE (our emphasis). The unbelievable trial transcript reveals the following:

"The Court: Well, you may not.

Now, would you mind making your objections out there in the courtroom?

Mr. Callaghan: In the courtroom?

The Court: Yes. I have one more conference in here.

Mr. Callaghan: I have just one last thing for the record, I have no objection to the jury signing the verdict, sealing the verdict and separating, provided they are returned here to be in open court at the time of the returned verdict so that they may be polled, if need be.

The Court: Very g d.

(The following further proceedings were had in open court, out of the presence of the court:)

Mr. Callaghan: I have requested of the court the opportunity to make my objections, and that he hear my objections to certain instructions as given and to instructions as refused.

I have done so pursuant to Rule 30 of the Federal Rules of Criminal Procedure.

The court has directed that any objection I make be made to the court reporter in his absence, and so

in obedience to the order of court I now do so, over objection." (Tr. 482)

This Court is now asked to review a Federal Criminal conviction where the lack of any charge conference, before or after the jury was instructed, lead to the giving, *inter alia*, of two (2) directed verdict of guilty instructions.[4] After the return of the sealed verdict (the evening of April 11, 1974, R. 56), but before reading the verdict on the morning of April 12, 1974, the transcript shows the following, which occurred in chambers, absent all counsel, relative to the 27 instructions tendered by the defendant:[5]

> (The following statement was made by the court, in chambers, out of the presence of counsel:)
>
> "The Court: For the record, Mr. Reporter, the court carefully considered each written instruction as presented by counsel for the government and for the defense, and the court caused each instruction to be marked either "Given" or "Refused", after full and complete research of the law pertaining to each instruction given.
>
> That is all." (Tr. 489)

Interestingly, the Court was found to have erroneously instructed the jury that:

> ". . . Such intent may be determined from all the facts and circumstances surrounding the case and from similar prior crimes and transactions. . ." (Tr. 468).

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[4] The Government's "directed Verdict of Guilty" instructions are included as App. C.

[5] All the defendants requested instructions were denied after the return of the sealed verdict (Tr. 489); each and every tendered Government instruction was given including the two (2) directed verdict of guilty instructions.

No evidence was proffered that Demopoulos had in anywise been involved in any prior crimes or transactions. The Court of Appeals found this instruction to be erroneously given, but reasoned that the *lack of objection* reduced the consideration of this error to "plain error" under Rule 52(b), and thus reversal was not required (Sl. Op. 11, 12).

The Court of Appeals affirmed. The divided panel finding that the trial errors failed to merit reversal while the dissent found that the cumulation of trial errors represented a "miscarriage of justice" (Sl. Op. 19).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW, CONFLICTS WITH DECISIONS OF THIS COURT PROHIBITING THE DISTRICT COURT FROM DIRECTING A VERDICT OF GUILTY.

In *United Brotherhood of Carpenters, et seq.* v. *United States*, 330 U.S. 395, (at 408) 67 S. Ct. 775 (1947), this Court reversed conspiracy to violate the Sherman Act convictions, and as relating to directing verdicts of guilty in a federal criminal case, this Court, through Mr. Justice Reed, stated:

> ". . . For a judge may not direct a verdict of guilty no matter how conclusive the evidence. There is no way of knowing here whether the jury's verdict was based on facts within the condemned instructions, note 19 above, or on actual authorization or ratification of such acts, note 18. A failure to charge correctly is not harmless, since the verdict might have resulted from the incorrect instruction. We are of the opinion, therefore, that the judge should have instructed the jury as to the limitations upon the association's liability for the acts of its agents under §6. The error is aggravated by the failure to give the correct charge upon request." 67 S.Ct. at 782, 783, (ft. nts. omitted).

In accord, *Sparf, et al.* v. *United States*, 156 U.S. 51, 15 S.Ct. 273 (1895).

The few Circuit Courts of Appeal speaking to this issue (directed verdict of guilty instructions) have uniformly reversed. In *United States* v. *Spock, et al.*, 416 F. 2d 165 (1st Cir., 1969) that Court set aside conspiracy to resist

the draft convictions, finding that instructions intimating a direction of guilty verdict, mandated reversal (416 F. 2d at 180 to 183; collecting cases). In *United States* v. *Hayward*, 420 F. 2d 142 (D.C. Cir., 1969) the Court reversed a first degree murder conviction because the trial judge charged the jury (in much the same wording as in this case) that if they did not believe an alibi defense then they "must" find the defendant guilty (420 F. 2d at 144). While reversing, the *Hayward* Court stated:

> "Implicit in the right to trial by jury afforded criminal defendants under the sixth amendment to the Constitution of the United States is the right to have that jury decide all relevant issues of fact and to weight the credibility of witnesses. By instructing the jurors that they *must* find the defendant guilty if they determined that the evidence placed him at the scene of the crime, the court took from the jury an essential element of its function.
>
> The judge cannot decide that upon the evidence the accused is guilty and direct a verdict accordingly; a finding of guilty is for the jury alone. Only when there is upon the evidence no doubt that the verdict must be not guilty can the judge 'take the case from the jury'; only then can he direct a verdict." (420 F. 2d at 144).

C. F. Cooper v. *United States*, 218 F. 2d 39 (D.C. Cir., 1954); *Compton* v. *United States*, 377 F. 2d 408, 411 (8th Cir., 1967); *Edwards* v. *United States*, 286 F. 2d 681, 683 (5th Cir., 1960); *Mims* v. *United States*, 375 F. 2d 135, 148 (5th Cir., 1967). In accord: *United States* v. *Oquendo*, 490 F. 2d 161 (5th Cir., 1974) Coll. Cases at 165, 166.

In *Silber* v. *United States*, 370 U.S. 717, 82 S. Ct. 1287 (1962), this Court reversed a contempt of congress conviction because of the insufficiency of an original indictment albeit the defective indictment argument was not

presented to the Court of Appeals and was not briefed or argued in this Court (82 S. Ct. at 1288). This Court reversed as follows:

> ". . . While ordinarily we do not take note of errors not called to the attention of the Court of Appeals nor properly raised here, that rule is not without exception. The Court has 'the power to notice a "plain error" though it is not assigned or specified.', *United Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 412, 67 S. Ct. 775, 784, 91 L. Ed. 973.' 'In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.' *United States* v. *Atkinson*, 297 U.S. 157, 160, 56 S. Ct. 391, 392, 80 L. Ed. 555. Our own rules provide that 'the court, at its option, may notice a plain error not presented.'" (Cit. omitted) 82 S. Ct. at 1288. In accord, *Brasfield, et al.* v. *United States*, 272 U.S. 448, 47 S. Ct. 135 (1926).

Demopoulos is the first to advise this Court that the "directed verdict of guilty instructions" were presented to the Court of Appeals for the first time in his Petition for Rehearing. *Silber, ante*, provides abundant authority that this Court may review "plain error" where the interest of the Federal Court, makes notice of the same, *Silber, ante;* collecting cases and authorities. In *Bollenbach* v. *United States*, 326 U.S. 607 (at 614), 66 S. Ct. 402 (at 406) (1946) this Court reversed a conspiracy to violate the National Stolen Property Act conviction for the tendering of impermissible instructions, finding, *inter alia*:

> "The question is not whether guilt may be spelt out of a record, but whether guilt has been found by

a jury according to the procedure and standards appropriate for criminal trials in the federal court." (66 S. Ct. at 406).

In *Wiborg, et al.* v. *United States*, 163 U.S. 632, 16 S. Ct. 1127 (1896) this Court found "reversible plain error" in the failure of the trial court to properly instruct the jury to find for either defendant (*Petersen and Johansen*) and accordingly reversed as to these defendants, finding, *inter alia*:

> ". . . No motion or request was made that the jury be instructed to find for defendants, or either of them. Where an exception to a denial of such a motion or request is duly saved, it is open to the court to consider whether there is any evidence to sustain the verdict, though not to pass upon its weight or sufficiency. And, although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it." (16 S. Ct. at 1137).

The Constitutional theory behind the prohibition of instructions directing verdicts of guilty in criminal cases is simply stated in a single paragraph from the opinion in *United States* v. *Spock*:

> "Uppermost of these considerations is the principle that the jury, as the conscience of the community, must be permitted to look at more than logic. Indeed, this is the principle upon which we began our discussion. If it were otherwise there would be no reason why a verdict should not be directed against a defendant in a criminal case than in a civil one. The constitutional guarantees of due process and trial by jury require that a criminal defendant be afforded the full protection of a jury unfettered, directly or indirectly. See Morris v. United States, 9 Cir., 1946, 156 F.2d 525. . . ." 416 F.2d at 182.

In the empty courtroom, absent the trial judge, Demopoulos objected to the directed verdict of guilty instructions (Tr. 484, 485). Thus preserved, the propriety vel non of the Government's instructions as read to the trial jury, with no review by the trial judge either before or after charging the jury, is now presented to this Court. The few reported decisions involving similar instructions clearly demonstrate, that the giving of such instructions mandate reversal.

II.

THE TOTAL FAILURE OF THE DISTRICT COURT TO IN ANYWISE COMPLY WITH RULE 30 MANDATES REVERSAL OF THIS CONVICTION.

The Statement of Facts, *ante*, demonstrate that the trial judge, over timely request, refused to partake in any pre-charge conference. Even more startling, was the failure of the trial court to listen to any post-charge objections. This Court has never considered such a situation. In *Hamling* v. *United States*, ... U.S. ....., 94 S. Ct. 2887, 41 L.Ed. 2d 590, (June, 1974) a majority of this Court affirmed a federal obscenity conviction. An issue reviewed in this Court, was the refusal of the trial judge to hear an objection to the jury charge out of the presence of the jury. Upon request, the trial Court held a low toned bench conference and considered the defendant's objections. In *Hamling*, the trial Court held a lengthy pre-charge conference as per Rule 30 (41 L. Ed. 2d 628, 629).[6] In the case at bar, neither pre- nor post-charge

[6] In *Hamling* the Court of Appeals considered the instruction conference "extensive and exhausting". 481 F. 2d 324.

conference was held. While affirming the convictions in *Hamling*, this Court, *inter alia*, stated:

> "We express no view, of course, as to whether a court of appeals may follow the apparently more lenient standard of requiring the defendant to demonstrate that he was prejudiced. See *United States* v. *Fernandez*, 456 F. 2d 638, 643, (CA2-1972)." (41 L. Ed. 2d 631).

The circuits are not in accord as to the effect, if any, from the total failure to hold any Rule 30 conference. This gains Constitutional magnitude in light of the directed verdict of guilty instructions given by the District Court in this case. In *Hall* v. *United States*, 378 F. 2d 349 (10th Cir., 1967) the trial Court held a pre-instruction conference (*id.*, at 350). Thereafter, defense counsel was compelled to object to the Court's instructions in the presence of the jury. That Court held, that to compel defense counsel to object in the presence of the jury was in violation of Rule 30 and a new trial was granted. In *United States* v. *Schartner, Jr.*, 426 F. 2d 470 (3rd Cir., 1970) the trial Court conducted a conference on instructions, (*id.*, at 438), but after the close of the charge to the jury, the Court compelled defense counsel to make objections to the charge in the presence of the jury. The Court of Appeals reversed the conviction, citing an opinion of this Court, *Bihn* v. *United States*, 328 U.S. 633, 638, 66 S. Ct. 1172 (1946). In *United States* v. *Fernandez*, 456 F. 2d 638, (2nd Cir., 1972), the Court of Appeals reversed a federal bank robbery conviction because defense counsel was compelled to take exception to the charge to the jury in the presence of the jury (*id.*, at 643). Interestingly, the instructions there objected to, were similar to the instructions in this case and are partially set out in the *Fernandez* opinion (*id.*, at 643, 644). In *United States* v. *Huffman*, 467 F. 2d

189 (6th Cir., 1972), that Court reversed a conviction relating to the mailing of letters threatening the President and Vice President of the United States. The conviction was reversed because the trial Court refused to hear objections to the Court's charge before the jury retired (*id.*, at 194, 195). The opinion is unclear as to whether the Court allowed a pre-instruction conference prior to the jury charge, but in *Huffman, ante*, the trial Court at least heard the defendant's objections as to the Court's charge after the jury retired. (id., at 194, 195).

In the case at bar, Demopoulos was denied his 5th Amendment right to due process because of the total failure of the trial Court to even hear defense counsel either before or after charging the jury. A deprivation of 5th Amendment due process to be sure. Demopoulos' 6th Amendment right to counsel was denied him, in that the Court refused to hear defense counsel in connection with the instructions either before or after the jury was charged. It is incredible that in a federal criminal trial that the trial judge would refuse to hear objections to the jury charge even after the jury retired. Rather, the District Court Judge gave defense counsel an empty courtroom, absent the judge, but with a court reporter so that defense counsel could make his objections (Tr. 482, 483).

Rule 30 states that counsel shall be given the "opportunity" "to make the objection". An opportunity to make an objection should mean the opportunity to make an objection to the judge, and to try to persuade him of his error, and we believe that the Rule should be so read. This Court would not deny allocution to a convicted felon, and the Court should not deny to counsel for anyone the right to make an objection to a judge.

We contend that Rule 30 is part of the "fair trial" which a defendant is supposed to receive; the deprivation of that right, like the deprivation of the right to confront a witness, is substantial, and a conviction should not be affirmed when that Rule is violated.

We further respectfully contend, that due process itself requires an opportunity to object within the conscious hearing of a judge so that a judge may decide if the objection is well taken or not. We submit that a denial of the right to speak to the judge about so important a part of the trial as the charge to the jury is in fact a denial of procedural due process. There is an absolute right to be heard, *United States* v. *Van Drunen*, 501 F.2d 1393 at 1396 (7th Cir., 1974).

The many cases involving violations of Rule 30 do not include a case in which counsel was required to make his objections to a court reporter.

This Court, has not expressly passed on the issue now presented, i.e., the total failure to conduct any instruction conference; which resulted, *inter alia*, with the jury receiving directed verdict of guilty instructions, and a prior crimes instruction. The 10th Circuit finds automatic prejudice for lack of Rule 30 compliance (*Hall* v. *United States*, *ante*.). The 2nd Circuit refused to follow the automatic reversal mandate of the 10th Circuit, but found that enforcement of Rule 30 should be at least as severe as that which had been applied in civil cases (*United States* v. *Fernandez*, 456 F. 2d at 644). In *United States* v. *Huffman*, *ante*, the 6th Circuit reversed, absent any statement about what standard, if any, should be applied regarding the failure to comply with Rule 30. Under the standard suggested in *United States* v. *Schartner, Jr.*, *ante*, the 3d Circuit observed:

"Because of Rule 30's explicit and mandatory direction to trial courts there are relatively few decisions dealing with a breach of the rule. The courts which have dealt with the problem demonstrate a difference of approach. Some decisions have held or indicated that the trial court's failure to comply with Rule 30 is not reversible error unless the defendant demonstrates he has been prejudiced thereby. See Sultan v. United States, 249 F.2d 385, 388 (5 Cir. 1957); United States v. Titus, 221 F.2d 571, 573-574 (2 Cir. 1955). Other cases assert that non-compliance with the rule warrants reversal unless it appears affirmatively that the defendant was not prejudiced. See Hodges v. United States, 243 F.2d 281, 283-284 (5 Cir. 1957); Lovely v. United States, 169 F.2d 386, 391 (4 Cir. 1948). Finally, at least one decision indicates that a trial court's failure to abide by the terms of Rule 30 demands automatic reversal. Hall v. United States, 378 F.2d 349 (10 Cir. 1967)." (426 F.2d at 479)

In *United States* v. *Clay, et al.,* 495 F.2d 700 (7th Cir., 1974) the Court affirmed a conspiracy to attempt to unlawfully enter a savings and loan association, where the issue on appeal related to the trial Court's non-compliance with Rule 30. The majority opinion apparently adopted the standard that the defendant must demonstrate affirmative prejudice, in order to warrant reversal for Rule 30 non-compliance (495 F.2d at 708, 709). In *Clay, ante,* Chief Judge Swygert dissented, finding *inter alia,* as follows:

"Moreover, I am not convinced that an affirmative showing by defendants of prejudice is necessary to render a violation of Rule 30 reversible error. In dealing with violations of the explicit and mandatory directions of Rule 30 the Fifth, Fourth, and Third Circuits have fashioned a rule that noncompliance with Rule 30 warrants reversal unless it appears affirmatively that the defendant was not prejudiced. *See* Hodges v.

United States, 243 F.2d 281, 283-284 (5th Cir. 1957); Lovely v. United States, 169 F.2d 386, 391 (4th Cir. 1948); United States v. Schartner, 426 F.2d 470, 479-480 (3d Cir. 1970). In Hall v. United States, 378 F.2d 349 (10th Cir. 1967), the court went so far as to hold that failure to comply with one of the mandatory provisions of Rule 30 merited automatic reversal without the necessity for any showing of prejudice. Without passing on the wisdom of the Tenth Circuit's holding that prejudice need not be shown, I would subscribe to a standard that in effect creates a presumption of prejudice in favor of the defendant due to the trial judge's failure to follow Rule 30. (495 F.2d 713, 714)

Neither this Court nor the several Circuit Courts of Appeal are in the least accord over what relief, if any, reasonably flows from Rule 30 non-compliance. The several Circuits range in relief from "automatic reversal" in the 10th Circuit to the "in-between range from reversal unless it affirmatively appears that the defendant has not been prejudiced (3rd, 4th and 5th Circuits) to the apparent necessity for a defendant to demonstrate real prejudice (7th Circuit). Review and direction from this Court is essential. With the hazard of repetition, we suggest that this Court has yet to review any federal criminal case where there was a total non-compliance with Rule 30 as is the case at bar. Here Rule 30 non-compliance was both total and in the extreme. The trial Court conducted no pre-instruction conference, no post-instruction conference, but did grant defense counsel, a Judgeless empty courtroom and a court reporter so that he may state his instruction objections "for the record". We muse whether the court reporter was to have ruled on the propriety vel non of the objections to instructions?? In *Hamling v. United States, ante*, this Court considered as the only Rule 30 breach, a low toned bench conference after the charge

to the jury and apparently rejected the 2nd Circuit standard of *United States* v. *Fernandez, ante*, but refused to express any view as to the proper standard that a Court of Appeals might apply while reviewing Rule 30 non-compliance. Clearly, the supervisory powers of this Court are called into focus and direction from this Court is essential.

CONCLUSION

Demopoulos has demonstrated that the combination of total Rule 30 non-compliance coupled with the giving of directed verdict instructions in combination reduced his federal criminal trial to Constitutional mockery. Review in this Court is merited and reversal of his perjury conviction can be the only reasonable result.

The split in circuits on Rule 30 non-compliance standards compel review in this Court so that some uniform standard is made available as a guide to the several circuits. The directed verdict of guilty instructions conflict with the decisions of this Court in *United Brotherhood, et seq.* v. *United States, ante*, and *Sparf* v. *United States, ante*, in accord, *United States* v. *Spock, ante*, *United States* v. *Hayward, ante*.

Respectfully submitted,

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APPENDIX

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 74-1341

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

JAMES G. DEMOPOULOS, *Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division — No. 73 CR 632
William J. Lynch, Judge.

ARGUED SEPTEMBER 18, 1974 — DECIDED NOVEMBER 5, 1974

Before HASTINGS, *Senior Circuit Judge,* CUMMINGS and PELL, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* Defendant was indicted in the Northern District of Illinois for violating 18 U.S.C. § 1623 (a), which specifically proscribes knowingly making false material declarations while a witness before a grand jury.[1] The indictment charged defendant with making the following false declarations:

[1] 18 U.S.C. § 1623 provides in pertinent part:
"(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

> "that he did not meet in the Rex Restaurant in Chicago in or about February 1969 with Peter Boznos and Sam Crispino, that he did not receive an envelope, parcel or package from either Sam Crispino or Peter Boznos in the Rex Restaurant in Chicago in or about February 1969, and that he did not receive any money from either Sam Crispino or Peter Boznos in the Rex Restaurant in Chicago in or about February 1969."

After a jury trial, defendant was convicted and was sentenced to 18 months in prison. On appeal, defendant raises numerous alleged errors and asserts that considering them together, he is entitled at least to a new trial. We affirm his conviction.

Sufficiency of the Evidence

Defendant first challenges the sufficiency of the evidence. The evidence shows that in early 1969 Samuel Crispino contracted to purchase the Cafe Chablis on West North Avenue in Chicago. He was represented in this transaction by attorney Peter Boznos. Crispino made his purchase of the restaurant contingent on his procuring a liquor license. At the time that the closing was originally scheduled in mid-February 1969, he had not obtained the liquor license, although he had applied for it on January 28, 1969. The liquor license was finally issued on February 26, 1969, and the closing took place on that date.

While Crispino's license application was pending in February 1969, Boznos received an anonymous telephone call from someone who said he was a Chicago Police Department vice officer. The caller said that Crispino's liquor license application would not be approved until a $5,000 payment was made. The caller later agreed to a reduced payment of $3,000. Boznos was instructed to go to the Rex

Restaurant in Chicago at midnight on a certain date to make the payment. Boznos was told that the defendant would be present at that restaurant to pick up the money.

A few days after this telephone call, Boznos and Crispino met at the Rex Restaurant. Crispino brought with him a package containing $2,000. (Why Crispino brought $2,000 when $3,000 had been agreed upon over the phone is not explained by any testimony in the record and is not relevant here.) Boznos testified that defendant joined them at their table a few minutes later. The defendant told Boznos that Crispino should put the money under the table. Crispino did so, and defendant picked it up and left the restaurant five to six minutes thereafter.

Boznos positively identified defendant as the recipient of the $2,000. Crispino described the recipient as a slender man, 5'6" to 5'7" in height, weighing 160 pounds, with black, wavy hair, about 30 to 35 years old, and appearing to be of Greek or Spanish extraction. The defendant was of Greek extraction and described himself as 35 years of age, 5'6¼" tall, weighing 165 to 170 pounds and having black hair. However, at the trial, when asked if the man to whom he had passed the $2,000 was in the courtroom, Crispino uncertainly selected Gregory Vlamis, a relative of defendant, who was seated in the first row of benches. Vlamis was 30 years old, 170 pounds and 5'11" tall. Crispino made it plain that he was not sure that this was the man in the Rex Restaurant.

Boznos' identification of defendant does not stand alone, for Crispino's portrait of the other person at the Rex Restaurant exactly matched defendant's self-description, even though Crispino also hesitatingly selected Gregory Vlamis as the bagman.

In our judgment, the testimony of Boznos and Crispino amply supported the verdict. It was within the jury's

province and not for us to assess the credibility of the Government's principal witness, Peter Boznos.

Admissibility of Telephone Conversation

Defendant next asserts that it was reversible error for the trial court to permit the jury to consider the aforesaid telephone conversation that Boznos had with the unidentified caller seeking a $5,000 bribe in exchange for police approval of the liquor license. Defendant contends that the conversation was inadmissible hearsay. Government counsel offered this conversation not to prove the truth of the matter but "as background operative facts to show subsequent actions of this and other witnesses" [Boznos and Crispino]. This limited purpose was reiterated to the jury in the prosecutor's closing argument, and the district court gave the following limiting instruction:

> "During the examination of the witness Peter Boznos, he testified concerning a phone conversation he had with an unknown individual from the Austin Police District. This conversation was admitted to allow you to understand subsequent actions which were taken by the witness Boznos and others. It was not offered for the truth of the matters contained in that phone conversation, and you are to consider that phone conversation only as it pertains to the subsequent actions of the witness Boznos and others, and you are not to consider it for the truth of anything, nor as proof of the matters asserted in that conversation."

In this setting, it was permissible to admit the challenged testimony. See *Tritsis* v. *Backer*, ... F.2d ..... (7th Cir. 1974); *United States* v. *Hickman*, 426 F.2d 515 (7th Cir. 1970).

In support of his contention that the telephone conversation was hearsay used to prove the truth of its contents, defendant claims that the prosecutor could have

characterized him as a bagman in the closing argument, as he did, only if the conversation was so used. This claim is simply wrong. Defendant was a lawyer without official influence on applications for liquor licenses. In light of this and since Crispino was providing $2,000 to affect favorably his application, the jury could infer entirely apart from the telephone conversation that defendant acted as a bagman for someone else when he accepted the $2,000 at midnight in the Rex Restaurant in February 1969.

Admissibility of Grand Jury Testimony

Defendant's testimony before the grand jury on August 21, 1973, was transcribed and consisted of 54 pages. Before the trial began, counsel for defendant and the Government agreed to numerous deletions in this testimony. Thus large portions of the transcript were deleted by agreement, including many whole pages. The court settled the questions of admissibility where the parties could not reach agreement. Defendant raised a uniform set of objections and asked that they be applied to each part of the transcript that he challenged. He argued that these portions of the transcript should not be admitted into evidence because they were irrelevant, immaterial and prejudicial to defendant. At the threshold of the trial and out of the presence of the jury, defense counsel made these objections to much of the non-deleted portions of the transcript, and the court sustained many of his objections, causing further deletions. The court agreed to treat defendant's objections as having been reiterated when the transcript was offered into evidence at trial.

On appeal defendant belatedly argues that the portions of the transcript relevant to whether defendant's false declarations were "material" to the grand jury's investigation should not have been read to the jury. (See 18

U.S.C. § 1623 (a), note 1, *supra.*) The apparent basis for the contention is the rule, well established in this Circuit, that the issue of materiality in a perjury charge is a question of law for the court. *United States* v. *Rivera,* 448 F.2d 757, 758 (7th Cir. 1971); *United States* v. *Parker,* 447 F.2d 826, 830 (7th Cir. 1971). However, at no point in the more than 60 transcript pages of colloquy between the court and counsel with relation to the proposed deletions did defendant's counsel suggest that the portions of the transcript relevant to materiality should be treated differently than other admissible portions. Indeed, at the outset of the colloquy he specifically stated that the prosecutor might read to the jury those portions of the transcript that the court ruled admissible. In this posture, we cannot accept defendant's over-due argument that there were two kinds of admissible evidence, one for the court and jury and one for the court alone.

In *Gebhard* v. *United States,* 422 F.2d 281, 289 (9th Cir. 1970), the full transcript of defendant's testimony before the grand jury was admitted before the petit jury during his perjury trial. On review, the court concluded that there was merit in the Government's argument that "The full transcript was admissible to show the materiality of perjured testimony to the subject matter of the grand jury's investigation." 422 F.2d at 289.[2] In this case, we need not and do not go so far as to adopt that holding as a general rule. We conclude only that the non-deleted portions of the transcript were admissible on

[2] In *Richards* v. *United States,* 329 F.2d 188, 190 (5th Cir. 1964), involving another perjury trial, the court held that certain testimony was admissible "to enable the trial court to determine the materiality of the false statement." As here, there was apparently no request that such testimony be considered only by the trial court in making its materiality ruling.

the issue of materiality to the investigation and could, therefore, be read to the jury in the absence of any objection that they should have been considered only by the judge.

Moreover, even had the defendant properly requested that the judge alone inspect those portions of the transcript that bore on materiality, there were alternative grounds for allowing the jury to consider the unexcised portions. The transcripts read to the jury were admissible on several issues which were to be decided by the jury: whether the defendant "knowingly" made false declarations before the grand jury (note 1, *supra*) and, in accordance with the instructions, whether he "intentionally committed the act" because, again according to the charge, "The crime charged in this case requires proof of specific intent before the defendant can be convicted." Furthermore, the challenged portions bore on wilfulness, which was defined in another of the instructions given by the trial judge. Finally, in considering defendant's objections before trial, the court sustained those that it considered most prejudicial to defendant, despite their arguable materiality.

Prosecutor's Alleged Comment on the Subject of Defendant's Taking the Stand

During the testimony of FBI Agent Johnson, defense counsel made an objection and stated:

> "This [testimony of Mr. Johnson] isn't impeaching of anything or anybody, or of the defense, or any testimony that the defendant has given."

Thereupon the prosecutor replied:

> "Your Honor, we will wait until he [defendant] takes the stand to impeach him. It is not offered to impeach him. It is offered as part of the case in chief of the government."

Defense counsel made no objection to this remark. Not until 15 transcript pages later did he move for a mistrial on the ground of the prosecutor's comment. The Assistant United States Attorney explained that "It was an invited response," resulting in the denial of the motion for a mistrial. We agree with the Government that this remark did not constitute a comment on defendant's failure thus far to testify nor compel him to take the stand. There has been no showing whatever that this fleeting episode prompted defendant to testify. Therefore, since defendant has shown no prejudice from the prosecutor's remark, the trial court did not err in denying his motion for mistrial.

Cross-Examination of Boznos

Defendant contends that the court unduly restricted his right to cross-examine Boznos by sustaining an objection to the following question:

> "Well, did you ever give any consideration and thought to going over to see [Austin Police District Commander] Mark Thanasouras about this?"

Defendant urges that the question should have been allowed in order to show that, since the two men knew each other well, Boznos would have dealt with Thanasouras directly rather than through defendant. The trial court was within its discretion in limiting the cross-examination by refusing this question because it was merely cumulative of prior testimony about the close relationship between Boznos and Thanasouras.

Cross-Examination of Character Witness

During the trial defendant placed his character in issue and called witnesses to testify as to his good reputation. Defendant contends on appeal that a question put

by the prosecutor during cross-examination of one of these witnesses caused such prejudice that a mistrial was required. Defendant's witness was asked:

> "In your discussions with other persons about James Demopoulos, did you ever hear the discussion that he had been picked out while a spectator, as a defendant, in this building?"

The Government concedes that the question was irrelevant and improper. The question resulted in an objection that was immediately sustained. Then counsel for the Government withdrew the question, and the court instructed the jury to disregard it. In these circumstances, there was no measurable prejudice to defendant which would justify a new trial.

Non-Compliance with Rule 30 of Federal Rules of Criminal Procedure

Defendant claims that reversal is required because of the court's violation of Rule 30 of the Federal Rules of Criminal Procedure.[3] Both sides tendered instructions to

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[3] Rule 30 provides:

> "*Instructions.* At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury."

the court for its consideration. In accordance with his custom, the trial judge said that he would not hold a conference on instructions unless he wanted suggestions and comments from counsel, in which case he would inform them. He added:

> "But I don't have conferences on instructions, especially where you quote the statute and so forth, or the law, upon which you are relying. Most of them are stock anyhow. There may be one or two where I will want to hear from you."

However, as the judge explained, he "carefully considered each written instruction as presented by counsel for the Government and for the defense, and the court caused each instruction to be marked either 'Given' or 'Refused', after full and complete research of the law pertaining to each instruction given."

After denying defendant's motion for acquittal, a 10-minute recess was given so that counsel could examine the instructions about to be given to the jury. Neither counsel requested additional time. After this recess, counsel made their respective arguments to the jury, and their arguments were followed by the charge.

After the charge was given and while the jury was deliberating, in the absence of the court and according to its then custom, defense counsel was permitted to present objections to the instructions. He noted on the record that this practice did not give the court the meaningful opportunity contemplated by Rule 30 for correcting any instructions to which objection had been made. After considering the objections, the court could have issued corrected instructions but did not choose to do so, thus overruling the objections *sub silentio*.

We condemned this practice in *United States* v. *Van Drunen*, ... F.2d ..... (7th Cir. 1974), and have noted that it no longer prevails in trials conducted by this judge after July 24, 1974, when *Van Drunen* was decided. In *United States* v. *Clay*, 495 F.2d 700, 708-709 (7th Cir. 1974), we held that violations of Rule 30 that clearly do not result in prejudice to a defendant will not result in reversible error.[4] Three and one-half months after our decision in *Clay*, the Supreme Court, in *Hamling* v. *United States*, ... U.S. ....., 42 LW 5035, specifically approved this approach to Rule 30 violations. The Court held that where it affirmatively appears that a defendant was not prejudiced by the violation reversal is not required. Consequently, we will examine the four instructions of which defendant complains and to which he was not permitted to make objection before the jury retired in order to decide whether it affirmatively appears from the record that the defendant was not prejudiced thereby.

Propriety of Instructions

Initially, defendant complains of the giving of LaBuy Instruction 6.04 relating to circumstantial evidence (33 F.R.D. 523, 572-73). The objection below was that this instruction "contains an erroneous interpretation or description of what constitutes circumstantial evidence." No further elaboration was given. In this Court, defendant complains of the instruction on the ground that the only circumstantial evidence was in the telephone conversation received by Boznos from an anonymous caller requesting $5,000 in order to secure police approval of his liquor license. Since this testimony was not received

[4] Accord, *United States* v. *Schartner*, 426 F.2d 470 (3d Cir. 1970); *Lovely* v. *United States*, 169 F.2d 386 (4th Cir. 1948).

in evidence as proof of the truth of the matter asserted, defendant argues that the Government should not have tendered this circumstantial evidence instruction. However, in his testimony, Crispino described the man he and Boznos met in the Rex Restaurant shortly after midnight in February 1969. This description tallied with the defendant's description of himself, and was enough circumstantial evidence to warrant this stock instruction.

Defendant next claims that the immunity instruction was unfair to defendant because it warned the jury only that "such testimony [of immunized witnesses] must be examined and weighed by the jury with greater care than the testimony of an ordinary witness." The jury was also instructed that in weighing the testimony of each witness it should consider his relationship to the Government or the defendant and any interest that he had in the outcome of the case. The jury charge also described the extent and scope of the immunity granted witnesses Boznos and Crispino under 18 U.S.C. § 6002. All this was equivalent to defendant's refused instruction L. Instruction L would have told the jury that the testimony of immunized witnesses "should be received with suspicion and considered and scrutinized with the very greatest of care and caution." The denial of this tendered instruction as repetitive of instructions given by the court was not prejudicial to defendant.

Defendant also complains that the word "informer" should have been included in this immunity instruction. This was not one of the grounds of objections at the trial. Furthermore, Boznos and Crispino were not informers, for they testified only when ordered to do so under grants of use immunity. In closing this matter, we cannot fault

the trial judge for the inclusion of the following sentence in the immunity instruction:

> "However, the fact that this government witness was granted immunity also is not a justification under the law for your finding a defendant not guilty if you find that his guilt has been proven beyond a reasonable doubt from your consideration of the evidence."

Defendant next complains of the parenthetical clause in the following sentence from the specific intent instruction which the court read to the jury:

> "Such intent may be determined from all the facts and circumstances surrounding the case (and from similar prior crimes and transactions)."

The Government admits that the parenthetical matter was inadvertently included in the instruction it furnished to the trial court. No objection was made to this instruction, so that error may not be assigned under Rule 30. Furthermore, since no evidence had been presented of "similar prior crimes and transactions," the jury could not have been misled. Therefore this surplusage should not be considered plain error under Rule 52 (b) and reversal is not required.

The last instruction of which defendant complains relates to the telephone conversation between Boznos and an anonymous caller. The instruction read as follows:

> "During the examination of the witness Peter Boznos, he testified concerning a phone conversation he had with an unknown individual from the Austin Police District. This conversation was admitted to allow you to understand subsequent actions which were taken by the witness Boznos and others. It was not offered for the truth of the

> matters contained in that phone conversation, and you are to consider that phone conversation only as it pertains to the subsequent actions of the witness Boznos and others, and you are not to consider it for the truth of anything, nor as proof of the matters asserted in that conversation."

Defendant argues that this instruction permitted the jury "to paint the conversation with the gilt of truth." To the contrary, the instruction reminded the jury that the telephone conversation was not offered for the truth of the matters therein. We disagree that this instruction "is the use of the telephone conversation, as truth, to corroborate the story of Boznos."

Therefore, since the record affirmatively shows that the defendant was not prejudiced by any of the instructions which he attacks, the violation of Rule 30 does not compel reversal here.

Newly Discovered Evidence

Defendant argues that the trial court erred in denying his motion for a new trial based on allegedly newly discovered evidence. Defendant claims that after the trial was over, his trial counsel first learned of a document indicating that Police Commander Thanasouras approved Crispino's application for a liquor license on February 5, 1969. It is defendant's contention that this so-called newly discovered evidence would be crucial to his defense because it indicates that the bribe was intended to secure an approval that had already been given, thereby raising doubt about the testimony of the Government's key witnesses. In truth, the document was shown to defendant's then counsel by the prosecutors and offered for copying two months prior to trial and was previously subpoenaed and received by him on January 31, 1974, the day before it was shown to him by government counsel.

Therefore, it cannot be considered as newly discovered evidence. Moreover, such evidence, even if truly newly discovered, would not require the district judge to grant a new trial because he could reasonably conclude that its probable effect in a new trial would not be to change the result. *United States* v. *Balistrieri*, 436 F.2d 1212, 1215 (7th Cir. 1971), certiorari denied, 402 U.S. 953. Where the license was not finally approved until February 26, 1969, and a police investigation of Crispino in Thanasouras' district was not completed until some time after February 5, 1969, it is reasonable to conclude that Thanasouras, despite his earlier formal approval, could have adversely influenced the granting of the license up to the time that Crispino actually received it. No new trial was required.

Attitude of the Trial Court

Finally, defendant complains that the court's "anger," expressed during defendant's cross-examination, prejudiced the jury against him. The challenged remark of the court occurred after the witness interrupted the judge and read as follows:

> "Now, just a minute. You are on the witness stand, and don't you forget it. You are not in the well of this court, and you'll take the advice of [your] counsel [not to volunteer anything], if you haven't up till now."

The court then explained that it did not want defendant to interrupt and start volunteering after his own counsel had admonished him not to volunteer. After the witness apologized, the court did likewise, and, before the afternoon session began, instructed the jury as follows:

> "You should not, by the tone of my voice, nor by any gesture on my part, interpret that as the court

> having any opinion on the guilt or innocence of this defendant. My sole venture, my sole mission here is to preside so that this defendant obtains a fair trial, and the government obtains a fair trial, and that is all. I have no interest whatsoever in the outcome of this lawsuit."

In view of this cautionary instruction and the court's own prior apology, this incident certainly did not deprive defendant of a fair trial.

The judgment of conviction is affirmed.

PELL, *Circuit* Judge, dissenting.

While the majority opinion is persuasively written, I am unable to dispel an opinion that the cumulative effect of the various matters raised by the appellant was such as to deprive him of a fair trial. Accordingly, I respectfully dissent.

Since, however, the determination of whether the combination of several incidents creates a sufficiently unfair trial as to call for reversal is essentially a balancing process with judgmental analysis being involved, I shall direct my attention primarily to two aspects of this trial which when taken together, and I do not believe they can be considered separately, deprived Demopoulos of a fair trial.

The two are: (1) the improper question put to a character witness saying in effect to the jury that Demopoulos had been previously picked out as a defendant in another courtroom in the federal court house building; and (2) the subsequent instruction indicating that a finding that the defendant had the requisite specific intent could be based upon his having been involved in similar prior crimes and transactions. The other trial incidents complained of, of course, when added to this base merely strengthen the necessity for a new trial.

The error of the instruction, tendered by the government and given by the court, cannot be viewed in a noncentextual vacuum. It is not disputed that there was no evidence of similar prior crimes and transactions but the entire tenor of the trial of the case, tried as it was during a period of widespread newspaper publicity in Chicago concerning scandals in the police department, was strongly suggestive to the jury that the defendant

Demopoulos was a part of those transactions. Particularly, the reference to prior criminal transactions was given further significance in the eyes of the jury because of the question put to the character witness indicating that Demopoulos "had been picked out while a spectator, as a defendant, in this building?"

I do not deem that there was any adequate cautionary instruction to remove from the jury's mind this reference to the defendant being identified as a defendant in another case in the same courthouse when taken in juxtaposition with the instruction with regard to specific intent. Counsel objected to the question to the character witness and the objection was sustained. Counsel then moved that the jury be instructed to disregard that completely. Only after the prosecuting attorney withdrew the question did the court advert further to the clearly improper question and then merely stated, "[c]ounsel for the government will withdraw the question, and the court instructs the jury to disregard the asking of that question." This conveyed nothing more to the jury than the fact that since the question had been withdrawn they should pay no attention to it. There was no admonition specifically directed to the matter of not giving any consideration to the fact, or the impropriety of disclosing, that Demopoulos had been picked out as a defendant in another case.

The error is made more serious by the fact that the incident involved a case of mistaken identification.

I fail to comprehend how the jury could not have been misled by the reference to "similar prior crimes and transactions" since no evidence had been presented in this regard. The very fact of lack of evidence has long been deemed a highly cogent reason for elimination or preclusion of reference in an instruction.

Thus, in *United States* v. *Breitling*, 61 U.S. 252, 254-55 (1858), Mr. Chief Justice Taney stated:

> "It is clearly error in a court to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered. The instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the court; and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them. It may induce them to indulge in conjectures, instead of weighing the testimony."

The converse of the present rule is the well-settled rule in criminal cases that if there is no evidence to support a particular defense, the trial judge is justified in refusing to submit such defense to the jury. *United States* v. *Gosser*, 339 F.2d 102, 109 (6th Cir. 1964), *cert. denied*, 382 U.S. 819. No more, however, should there be an instruction given as to which there is no supportive evidence.

In *United States* v. *Collier*, 313 F.2d 157, 159 (7th Cir. 1963), *cert. denied*, 374 U.S. 844, this court held erroneous an instruction explaining the term "special employee" because there was no basis in the evidence and another instruction which assumed, "with no proof of the fact, that defendant was ready, willing and able to commit the offense charged."

The mere implication of unlawful conduct other than that charged against a defendant is ground for reversal. In *United States* v. *Leggett*, 312 F.2d 566, 574 (4th Cir. 1962), the only issue was whether the defendant had represented himself to be an F.B.I. agent. The Government in presenting its case claimed he was not even li-

censed as a private investigator. The trial court in referring to this contention, charged the jury in part:

> "And had no right therefore to seek information concerning the registration of any guests they had and that at the most he was a trespasser."

In reversing, the court stated:

> "If he had been an invited and welcome guest it would have made no difference. 'Trespass' signifies a transgression or wrongful act, *Nolan* v. *New York N. H. & H. R. Co.* 70 Conn. 159, 39 A. 115, 43 L.R.A. 305; and this is particularly true in the minds of laymen, unacquainted with the niceties of legal definitions. The facts of this case did not justify applying the term 'trespasser' to the appellant and its use may well have led the jury to infer that the appellant committed a crime just by going to the motel. It certainly tended to divert them from the real and sole issue in the case."

The mere inclusion of the words "assaults any person" in an instruction dealing with a Count of an indictment which did not charge an assault, although the section of the statute on which the Count was based did include "assaults any person," was deemed serious enough error to require reversal "and so clear that appellant is not precluded from raising it here notwithstanding that he failed to object to that charge below." *United States* v. *Roach*, 321 F.2d 1, 4 (3d Cir. 1963).

While ordinarily an incorrect instruction if favorable to the defendant will not be deemed prejudicial to him, "[w]hen a false issue of magnitude sufficient to nullify proper consideration of the issues is inserted into a case [by instructions], the proper administration of justice is thwarted and a conviction so based cannot stand." *Michaud* v. *United States*, 350 F.2d 131, 133-34 (10th Cir. 1965). There the court held that the inclusion of a false

issue in the case was plain error under Rule 52(b), Fed. R. Crim. P., requiring reversal. In the case before us the trial court interjected, albeit inadvertently but nevertheless patently there, an extraneous issue of law. "Extraneous *law* may be quite as prejudicial as extraneous *facts*. Verdicts should be based only on the evidence in the case and the pertinent law as applied to that evidence." *United States* v. *Hill*, 417 F.2d 279, 281 (5th Cir. 1969).

In *Morris* v. *United States*, 326 F.2d 192, 195 (9th Cir. 1963), the district court gave an instruction that flight or concealment immediately after the commission of a crime may be considered as a fact bearing on guilt just as in the case at bar prior similar crimes or transactions could be considered as bearing upon the existence of specific intent. In *Morris*, there was no evidence that the defendant had fled or concealed himself. Here there was no evidence of prior similar crimes. In *Morris*, "the danger that the jury might have been led to indulge in conjecture" was heightened by a testimonial reference to the defendant as a fugitive. In the present case, the danger of jury conjecture was heightened by the reference (in the improper question during testimony) to Demopoulos having been picked out as a defendant in another case. In *Morris*, there was a reversal. There should be here.

The prejudice of the unremoved reference to criminal identification plus the erroneous instruction was made more stringent in impact in the present case by the fact that the basic question presented to the jury was to decide as a matter of credibility whether to believe Boznos who identified the defendant as the person to whom the money was paid or whether to believe the defendant who took the stand and denied any participation. The only other eye witness to the transaction was unable to iden-

tify Demopoulos in the courtroom. On the one-to-one basis presented to the jury, it is impossible to say that the scales-tipping feather was not the false criminality issue introduced and it is no answer to say that the introduction of the false issue was inadvertent. Also, other factors here must be considered as further denigrating the defendant's credibility, such as the trial court's rebuke of the defendant as a witness.

It is true, of course, that a proper objection was not made to the instruction. However, in the highly improper way in which the matter of instructions was handled the lack of objection is not surprising. It helps Demopoulous's miscarriage of justice very little that the district court judge is no longer following the cursory procedure utilized in the present case. With further reference to the nature of the attention given to the matter of instructions, it is noted that the defendant tendered some 25 instructions, each of which, according to the trial judge, he had carefully considered and had marked "Given" or "Refused." Yet, every instruction tendered by the defendant was refused with a notation in each case that it was repetitive or argumentative or both. Perhaps most of the tendered instructions were covered by those given by the court; however, a careful examination would have reflected that defendant's instruction Q was verbatim with that given by the court with the exception of the added crucial words "and from similar prior crimes and transactions."

With regard to the other contentions raised by the defendant, I emerge from an examination of the record with the distinctly uncomfortable feeling that somewhere along the line sight was lost of the sole issue which was supposedly being tried and that was whether Demopoulous falsely denied to a grand jury that he had picked up a package of money in February 1969 at a specified restau-

rant in Chicago from one of two named individuals. This was not a trial of an obstruction of justice charge nor a bribery case, nor even a disbarment proceeding. Although the parties stipulated facts prior to the trial which rather clearly demonstrated the materiality of the challenged grand jury testimony and although the court treated the materiality determination as being for the court and not the jury, nevertheless substantial portions of the grand jury testimony went before the trial jury as to occurrences both before and after the supposed restaurant meeting.

Finaly, in viewing the record as a whole, I find myself disturbed by the frequency with which resort has had to be taken to cautionary instructions to save the fairness of the trial. Under the circumstances of this case, Mr. Justice Jackson's often quoted words in his concurring opinion in *Krulewitch* v. *United States,* 336 U.S. 440, 453 (1949), are particularly apt: "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."

For the reasons set out hereinbefore, I would reverse and remand for a new trial.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

December 12, 1974.

Before

Hon. John S. Hastings, Senior Circuit Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 74-1341 vs.

JAMES G. DEMOPOULOS,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 73 CR 632
William J. Lynch, Judge.

ORDER

On consideration of the petition of the appellant, James G. Demopoulos, for a rehearing by the Court in the above-entitled appeal, and no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing, and the panel majority having voted to deny a rehearing,

IT IS ORDERED that the petition of the appellant for a rehearing in the above-entitled appeal be, and the same is hereby denied.

Judge Pell voted to grant a rehearing.

APPENDIX C

GOVERNMENT INSTRUCTION NO. .....

The accuracy of an identification of a particular defendant by a witness in this case must be determined from all the circumstances relating to that identification. In this connection, if you believe from all the evidence and circumstances pertaining to a particular defendant that there is reasonable doubt as to the accuracy of the identification and of that defendant as a participant in the acts charged in the indictment, then you must find him not guilty. On the other hand, if you find beyond a reasonable doubt from all the evidence and circumstances that the identification of that particular defendant as a participant in the acts charged in the indictment is accurate, then you must find him guilty.

United States v. *Barber*, 442 F.2d 517 (3rd Cir. 1971)

GOVERNMENT INSTRUCTION NO. .....

(Modified)

The defendant in this case states that he was not at the Rex Restaurant with the witnesses Boznos and Crispino. The burden of proof is on the prosecution with reference to each element of the crime charged and this burden includes the burden to prove beyond a reasonable doubt that the defendant was the person at the Rex Restaurant on the date in question. In considering the testimony concerning the identification of the defendant, you will determine the credibility and weight of this evidence in the same way as you do other evidence and if you do not be-

lieve beyond a reasonable doubt that the defendant James Demopoulos was at the Rex Restaurant on the date in question then you should find him not guilty. On the other hand, if you find beyond a reasonable doubt from all the evidence and circumstances that James Demopoulos was at the Rex Restaurant on the date in question then you should find him guilty.

United States v. *Hessler*, 469 F.2d 1294 (7th Cir. 1972)
United States v. *Barber*, 442 F.2d 517 (3rd Cir. 1971)